

ORIGINAL

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Attorneys for Plaintiff

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2008 AUG 29 PM 1:25
CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
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9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 '08 CV 1589 BTM WMc

12
13 BARBARA HUBBARD,

14 Plaintiff,

15 vs.

16 PNS STORES, INC. dba BIG LOTS
17 #04027; WEALTH ENTERPRISES,
18 LLC; RANCHO BROADWAY,
19 LTD., A CALIFORNIA LIMITED
20 PARTNERSHIP,

Defendants.

No.

Plaintiff's Complaint

I. SUMMARY

1. This is a civil rights action by plaintiff Barbara Hubbard (“Hubbard”) for discrimination at the building, structure, facility, complex, property, land, development, and/or surrounding business complex known as:

Big Lots #04027
1210 Broadway
Chula Vista, CA 91911
(hereafter “the Store”)

2. Hubbard seeks damages, injunctive and declaratory relief, attorney fees and costs, against PNS Stores, Inc. dba Big Lots #04027; Wealth Enterprises, LLC; and, Rancho Broadway, LTD., a California Limited Partnership (hereinafter collectively referred to as “Big Lots”) pursuant to the Americans with Disabilities Act of 1990, (42 U.S.C. §§ 12101 et seq.), and related California statutes.

II. JURISDICTION

3. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343 for ADA claims.

4. Supplemental jurisdiction for claims brought under parallel California law—arising from the same nucleus of operative facts—is predicated on 28 U.S.C. § 1367.

5. Hubbard’s claims are authorized by 28 U.S.C. §§ 2201 and 2202.

III. VENUE

6. All actions complained of herein take place within the jurisdiction of the United States District Court, Southern District of California, and venue is invoked pursuant to 28 U.S.C. § 1391(b), (c).

IV. PARTIES

7. Big Lots owns, operates, and/or leases the Store, and consists of a person (or persons), firm, and/or corporation.

8. Hubbard has multiple conditions that affect one or more major life functions. She requires the use of motorized wheelchair and a mobility-equipped vehicle, when traveling about in public. Consequently, Hubbard is “physically disabled,” as defined by all applicable California and United States laws, and a member of the public whose rights are protected by these laws.

V. FACTS

9. The Store is an establishment open to the public, intended for nonresidential use and whose operation affects commerce.

10. Hubbard visited the Store and encountered barriers (both physical and intangible) that interfered with—if not outright denied—her ability to use and enjoy the goods, services, privileges, and accommodations offered at the facility. To the extent known by Hubbard, the barriers at the Store included, but are not limited to, the following:

- The tow away signage posted is not correct;
- The International Symbols of Accessibility painted in the disabled parking spaces are too small;
- The signage at the van accessible space is not correct;
- The adjacent access aisle(s) has a slope and cross slope that exceed 2.0% due to the encroaching built up curb ramp;
- The entrance door has “panel type” handles that are not accessible;
- At least one aisle is less than 36 inches wide;
- There is no checkstand designated as being accessible to the disabled;
- There is no directional signage to the restroom;
- The operable part of the disposable seat cover dispenser is mounted at more than 40 inches from the floor;
- Due to its location above and behind the water closet, the disposable seat cover dispenser is outside of the required reach range limits;

- 1 • The water closet is an obstruction to the use of the disposable seat cover
- 2 dispenser;
- 3 • The water closet flush valve is not located on the correct side;
- 4 • The pipes underneath the lavatory are improperly and/or incompletely
- 5 wrapped; and,
- 6 • The operable part of the paper towel dispenser is mounted at more than 40
- 7 inches from the floor.

8 These barriers prevented Hubbard from enjoying full and equal access.

9 11. Hubbard was also deterred from visiting the Store because she
10 knew that the Store's goods, services, facilities, privileges, advantages, and
11 accommodations were unavailable to physically disabled patrons (such as
12 herself). She continues to be deterred from visiting the Store because of the
13 future threats of injury created by these barriers.

14 12. Hubbard also encountered barriers at the Store, which violate state
15 and federal law, but were unrelated to her disability. Nothing within this
16 Complaint, however, should be construed as an allegation that Hubbard is
17 seeking to remove barriers unrelated to her disability.

18 13. Big Lots knew that these elements and areas of the Store were
19 inaccessible, violate state and federal law, and interfere with (or deny) access to
20 the physically disabled. Moreover, Big Lots has the financial resources to
21 remove these barriers from the Store (without much difficulty or expense), and
22 make the facility accessible to the physically disabled. To date, however, Big
23 Lots refuses to either remove those barriers or seek an unreasonable hardship
24 exemption to excuse non-compliance.

25 14. At all relevant times, Big Lots has possessed and enjoyed sufficient
26 control and authority to modify the Store to remove impediments to wheelchair
27 access and to comply with the Americans with Disabilities Act Accessibility
28 Guidelines and Title 24 regulations. Big Lots has not removed such

1 impediments and has not modified the Store to conform to accessibility
 2 standards. Big Lots has intentionally maintained the Store in its current
 3 condition and has intentionally refrained from altering the Store so that it
 4 complies with the accessibility standards.

5 15. Hubbard further alleges that the (continued) presence of barriers at
 6 the Store is so obvious as to establish Big Lots discriminatory intent.¹ On
 7 information and belief, Hubbard avers that evidence of this discriminatory intent
 8 includes Big Lots refusal to adhere to relevant building standards; disregard for
 9 the building plans and permits issued for the Store; conscientious decision to the
 10 architectural layout (as it currently exists) at the Store; decision not to remove
 11 barriers from the Store; and allowance that the Store continues to exist in its non-
 12 compliant state. Hubbard further alleges, on information and belief, that Big
 13 Lots is not in the midst of a remodel, and that the barriers present at the Store are
 14 not isolated (or temporary) interruptions in access due to maintenance or
 15 repairs.²

16 VI. FIRST CLAIM

17 Americans with Disabilities Act of 1990

18 Denial of "Full and Equal" Enjoyment and Use

19 16. Hubbard incorporates the allegations contained in paragraphs 1
 20 through 15 for this claim.

21 17. Title III of the ADA holds as a "general rule" that no individual
 22 shall be discriminated against on the basis of disability in the full and equal
 23 enjoyment (or use) of goods, services, facilities, privileges, and accommodations
 24 offered by any person who owns, operates, or leases a place of public
 25 accommodation. 42 U.S.C. § 12182(a).

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 27
 28 ¹ E.g., *Gunther v. Lin*, 144 Cal.App.4th 223, fn. 6

² Id.; 28 C.F.R. § 36.211(b)

1 18. Big Lots discriminated against Hubbard by denying “full and equal
2 enjoyment” and use of the goods, services, facilities, privileges or
3 accommodations of the Store during each visit and each incident of deterrence.

4 Failure to Remove Architectural Barriers in an Existing Facility

5 19. The ADA specifically prohibits failing to remove architectural
6 barriers, which are structural in nature, in existing facilities where such removal
7 is readily achievable. 42 U.S.C. § 12182(b)(2)(A)(iv). The term “readily
8 achievable” is defined as “easily accomplishable and able to be carried out
9 without much difficulty or expense.” *Id.* § 12181(9).

10 20. When an entity can demonstrate that removal of a barrier is not
11 readily achievable, a failure to make goods, services, facilities, or
12 accommodations available through alternative methods is also specifically
13 prohibited if these methods are readily achievable. *Id.* § 12182(b)(2)(A)(v).

14 21. Here, Hubbard alleges that Big Lots can easily remove the
15 architectural barriers at the Store without much difficulty or expense, and that
16 Big Lots violated the ADA by failing to remove those barriers, when it was
17 readily achievable to do so.

18 22. In the alternative, if it was not “readily achievable” for Big Lots to
19 remove the Store’s barriers, then Big Lots violated the ADA by failing to make
20 the required services available through alternative methods, which are readily
21 achievable.

22 Failure to Design and Construct an Accessible Facility

23 23. On information and belief, the Store was designed or constructed (or
24 both) after January 26, 1992—independently triggering access requirements
25 under Title III of the ADA.

26 24. The ADA also prohibits designing and constructing facilities for
27 first occupancy after January 26, 1993, that aren’t readily accessible to, and
28

1 usable by, individuals with disabilities when it was structurally practicable to do
2 so. 42 U.S.C. § 12183(a)(1).

3 25. Here, Big Lots violated the ADA by designing or constructing (or
4 both) the Store in a manner that was not readily accessible to the physically
5 disabled public—including Hubbard—when it was structurally practical to do
6 so.³

7 Failure to Make an Altered Facility Accessible

8 26. On information and belief, the Store was modified after January 26,
9 1992, independently triggering access requirements under the ADA.

10 27. The ADA also requires that facilities altered in a manner that affects
11 (or could affect) its usability must be made readily accessible to individuals with
12 disabilities to the maximum extent feasible. 42 U.S.C. § 12183(a)(2). Altering
13 an area that contains a facility's primary function also requires adding making
14 the paths of travel, bathrooms, telephones, and drinking fountains serving that
15 area accessible to the maximum extent feasible. *Id.*

16 28. Here, Big Lots altered the Store in a manner that violated the ADA
17 and was not readily accessible to the physically disabled public—including
18 Hubbard—to the maximum extent feasible.

19 Failure to Modify Existing Policies and Procedures

20 29. The ADA also requires reasonable modifications in policies,
21 practices, or procedures, when necessary to afford such goods, services,
22 facilities, or accommodations to individuals with disabilities, unless the entity
23 can demonstrate that making such modifications would fundamentally alter their
24 nature. 42 U.S.C. § 12182(b)(2)(A)(ii).

25 30. Here, Big Lots violated the ADA by failing to make reasonable
26 modifications in policies, practices, or procedures at the Store, when these

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28 ³ Nothing within this Complaint should be construed as an allegation that plaintiff is bringing this action as a private attorney general under either state or federal statutes.

1 modifications were necessary to afford (and would not fundamentally alter the
2 nature of) these goods, services, facilities, or accommodations.

3 31. Hubbard seeks all relief available under the ADA (*i.e.*, injunctive
4 relief, attorney fees, costs, legal expense) for these aforementioned violations. 42
5 U.S.C. § 12205.

6 32. Hubbard also seeks a finding from this Court (*i.e.*, declaratory
7 relief) that Big Lots violated the ADA in order to pursue damages under
8 California's Unruh Civil Rights Act or Disabled Persons Act.

9 VII. SECOND CLAIM

10 Disabled Persons Act

11 33. Hubbard incorporates the allegations contained in paragraphs 1
12 through 30 for this claim.

13 34. California Civil Code § 54 states, in part, that: Individuals with
14 disabilities have the same right as the general public to the full and free use of
15 the streets, sidewalks, walkways, public buildings and facilities, and other public
16 places.

17 35. California Civil Code § 54.1 also states, in part, that: Individuals
18 with disabilities shall be entitled to full and equal access to accommodations,
19 facilities, telephone facilities, places of public accommodation, and other places
20 to which the general public is invited.

21 36. Both sections specifically incorporate (by reference) an individual's
22 rights under the ADA. See Civil Code §§ 54(c) and 54.1(d).

23 37. Here, Big Lots discriminated against the physically disabled
24 public—including Hubbard—by denying them full and equal access to the Store.
25 Big Lots also violated Hubbard's rights under the ADA, and, therefore, infringed
26 upon or violated (or both) Hubbard's rights under the Disabled Persons Act.

27 38. For each offense of the Disabled Persons Act, Hubbard seeks actual
28 damages (both general and special damages), statutory minimum damages of one

1 thousand dollars (\$1,000), declaratory relief, and any other remedy available
2 under California Civil Code § 54.3.

3 39. She also seeks to enjoin Big Lots from violating the Disabled
4 Persons Act (and ADA) under California Civil Code § 55, and to recover
5 reasonable attorneys' fees and incurred under California Civil Code §§ 54.3 and
6 55.

7 VIII. THIRD CLAIM

8 Unruh Civil Rights Act

9 40. Hubbard incorporates the allegations contained in paragraphs 1
10 through 30 for this claim.

11 41. California Civil Code § 51 states, in part, that: All persons within
12 the jurisdiction of this state are entitled to the full and equal accommodations,
13 advantages, facilities, privileges, or services in all business establishments of
14 every kind whatsoever.

15 42. California Civil Code § 51.5 also states, in part, that: No business
16 establishment of any kind whatsoever shall discriminate against any person in
17 this state because of the disability of the person.

18 43. California Civil Code § 51(f) specifically incorporates (by
19 reference) an individual's rights under the ADA into the Unruh Act.

20 44. Big Lots aforementioned acts and omissions denied the physically
21 disabled public—including Hubbard—full and equal accommodations,
22 advantages, facilities, privileges and services in a business establishment
23 (because of their physical disability).

24 45. These acts and omissions (including the ones that violate the ADA)
25 denied, aided or incited a denial, or discriminated against Hubbard by violating
26 the Unruh Act.

27 46. Hubbard was damaged by Big Lots wrongful conduct, and seeks
28 statutory minimum damages of four thousand dollars (\$4,000) for each offense.

1 3. Statutory minimum damages under either sections 52(a) or 54.3(a) of the
2 California Civil Code (but not both) according to proof.

3 4. Attorneys' fees, litigation expenses, and costs of suit.⁴

4 5. Interest at the legal rate from the date of the filing of this action.
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6 DATED: August 27, 2008

DISABLED ADVOCACY GROUP, APLC

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9 LYNN HUBBARD, III
10 Attorney for Plaintiff
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⁴ This includes attorneys' fees under California Code of Civil Procedure § 1021.5.
Hubbard v. PNS Stores, Inc., et al.
Plaintiff's Complaint

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Barbara Hubbard

(b) County of Residence of First Listed Plaintiff SAN DIEGO

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

LYNN HUBBARD, III DISABLED ADVOCACY GROUP, APLC
12 Williamsburg Lane Chico, CA 95926 (530) 895-3252

DEFENDANTS

PNS Stores, Inc. dba Big Lots #040277, a California Limited Partnership
LLC; Rancho Broadway, LTD., a California Limited Partnership

County of Residence of First Listed Defendant PERKINS COUNTY, NEBRASKA
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 650 Airline Regs.		<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Product Damage Product Liability	<input type="checkbox"/> 660 Occupational Safety/Health		<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 355 Motor Vehicle Product Liability		<input type="checkbox"/> 690 Other		<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 360 Other Personal Injury				<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 190 Other Contract					<input type="checkbox"/> 850 Securities/Commodities/Exchange
<input type="checkbox"/> 195 Contract Product Liability					<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 196 Franchise					<input type="checkbox"/> 890 Other Statutory Actions
					<input type="checkbox"/> 891 Agricultural Acts
					<input type="checkbox"/> 892 Economic Stabilization Act
					<input type="checkbox"/> 893 Environmental Matters
					<input type="checkbox"/> 894 Energy Allocation Act
					<input type="checkbox"/> 895 Freedom of Information Act
					<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
					<input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. Section 12101, et seq.

Brief description of cause:
Ongoing violations of the ADA Construction Standards

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

08/27/2008

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

154367

AMOUNT

\$350

APPLYING IFP

JUDGE

MAG. JUDGE

Lenny

8/29/08

**UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION**

154567 - TC

**August 29, 2008
13:23:34**

Civ Fil Non-Pris

USAO #.: 08CV1589

Judge.: BARRY T MOSKOWITZ

Amount.:

\$350.00 CC

Total-> \$350.00

**FROM: BARBARA HUBBARD
VS
PNS STORES**